(18,310.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 188.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Citation.

To the United States, Greeting:

The Oregon & California Railroad Company having, on this day, been granted an order of appeal to the United States circuit court of appeals for the ninth circuit, from the decree entered on June 15th, 1900, in suit No. 2,388 in the circuit court of the United States for the district of Oregon, brought by The United States as complainant against the said company; and the bond on appeal of the said company having been this day filed and approved:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, at San Francisco, California, on September 3d, 1900, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

2 Given under my hand, at Portland, Oregon, on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

Due service admitted on August 11th, 1900.

JOHN H. HALL,
U. S. Attorney, District of Oregon.

(Endorsed:) No. 2,388. United States circuit court of appeals, 9th circuit. United States *vs.* Oregon and California Railroad Co. Citation. United States circuit court. Filed August 11, 1900. J. A. Sladen, clerk. District of Oregon. Wm. D. Fenton, Portland, Or., and Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal., attorneys for appellant.

In the Circuit Court of the United States for the District of Oregon, April Term, 1897.

Be it remembered, that on the 15th day of April, 1897, there was duly filed in the circuit court of the United States for the district of Oregon, a bill of complaint, in words and figures as follows, to wit:

3 In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant.

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the district of Oregon, sitting in equity:

The United States of America, by Joseph McKenna, its Attorney General, brings this its bill of complaint as against the above-named defendant, and complaining says:

Par. 1. That during all the times hereinafter mentioned, the Oregon & California Railroad Company was a corporation duly incorporated under and by virtue of the general laws of the State of Oregon.

Par. 2. That the Congress of the United States by an act entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866, authorized such company organized under the laws of Oregon, as the legisla-
4 ture of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland, and running thence through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California, and granted to said Oregon Company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, ten on each side of said railroad, and when any of said alternate sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections, and as soon as the company should file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale the public lands therein granted on each side of said railroad so far as located and within the limits above specified.

And your orator shows that by joint resolution, adopted October 20, 1868, of the legislature of the State of Oregon, the Oregon Central Railroad Company was designated, in accordance with said last-mentioned act of Congress, as capable of receiving and
5 undertaking the privileges, franchises, grants, and duties above set forth, and did become the corporation entitled to

all the benefits and subject to all the obligations of said act of Congress, and that on or about April 4, 1870, the said Oregon & California Railroad Company, a corporation duly organized under the laws of Oregon, became the successor and assign of said Oregon Central Railroad Company.

Par. 3. And your orator would further show unto your honors, that in the year 1870 the officers of the Oregon & California Railroad Company definitely fixed the line of said railroad authorized by said act of Congress, and filed a plat thereof in the office of the Commissioner of the General Land Office and presented the same to the then Secretary of the Interior, showing among other things a route along the line authorized by said act of Congress, approved July 25, 1866, and the following-described, among other lands in the State of Oregon, were odd-numbered sections or parts of odd-numbered sections of public lands, not mineral, without the place limits and within the indemnity limits of said proposed line of railroad as designated by said map, viz: the S. ½ of the N. E. ¼, the N. W. ¼ of the S. E. ¼, the N. E. ¼ of the S. W. ¼, and the S. E. ¼ of the N. W. ¼ of sec. 1, tp. 2 south, range 5, west of the Willamette meridian.

Par. 4. And your orator would further show unto your honors, that on the 22d day of November, 1853, John W. Hines, a duly qualified donation claimant under the laws of the United States, duly filed a donation notification No. 3,390 for a half section of land embracing among other lands the S. ½ of the N. E. ¼, the N. W. ¼ of the S. E. ¼, the N. E. ¼ of the S. W. ¼, and the S. E. ¼ of the
6 N. W. ¼ of sec. 1, tp. 2 south, range 5 west of the Willamette meridian, and that the said land was not public land subject to the grant to said Oregon & California Railroad Company.

Par. 5. And your orator would further show unto your honors, that on the 12th day of July, 1871, the President of the United States, without knowledge of the adverse claim of John W. Hines, issued to the defendant, The Oregon & California Railroad Company, a patent for the following-described lands amongst other lands, to wit: the S. ½ of the N. E. ¼, the N. W. ¼ of the S. E. ¼, the N. E. ¼ of the S. W. ¼, and S. E. ¼ of the N. W. ¼ of sec. 1, tp. 2 south, range 5 west of the Willamette meridian.

But your orator avers that the ministerial officers of your orator acted mistakenly, erroneously, and contrary to law in issuing patent to the defendant The Oregon & California Railroad Company for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

Par. 6. And your orator further shows that the Congress of the United States, by an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, directed and authorized the Secretary of the Interior to adjust all grants theretofore unadjusted,

and if it should appear that any lands had been erroneously patented to any railroad company, to make demand for relin-
7 quishment or reconveyance, and if such company should refuse to reconvey within ninety days, then it should be the duty of the Attorney General to commence and prosecute in the proper court the necessary proceedings to cancel such patents and restore title to the United States. And your orator avers that on the 15th day of May, 1895, the total grant of lands in the State of Oregon under said grant of July 25, 1866, to said Oregon Central Railroad Company, to the rights of which said Oregon & California Railroad Company had succeeded as aforesaid was unadjusted, and the Secretary of the Interior, regarding the said patent to the above-described lands as erroneously issued, directed the Commissioner of the General Land Office to request reconveyance as provided by statute, and in accordance with such direction the Commissioner of the General Land Office did, on said 15th day of May, 1895, make demand on said railroad company by a letter addressed to William Mills, land agent of the Oregon & California Railroad Company, controlling the grant for said Oregon & California Railroad Company, for reconveyance of said above-described lands. And your orator avers that no response has been made to said demand for reconveyance as requested, and that said defendant company has refused and still refuses to so reconvey said lands.

Forasmuch, therefore, as your orator is without adequate remedy in a court of law, and to the end that the said defendant company may, if it can, show why your orator should not have the relief herein prayed, and the matters herein may be determined according to equity and good conscience, your orator brings this suit and prays that patent purporting to convey title to said above-
8 described lands may be set aside, canceled, and declared null and void. And your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this court, directed to the defendant, The Oregon & California Railroad Company, commanding it on a day certain and under a certain penalty therein to be specified, personally to be and appear in this court and then and there to answer, but not under oath (an answer under oath being hereby expressly waived), and to abide such order and decree as to your honors may seem proper.

JOSEPH McKENNA,
Attorney General of the United States.
DANIEL R. MURPHY,
United States Attorney for Oregon,
By CHAS. J. SCHNABEL,
Assistant United States Attorney.

Filed April 15, 1897.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

9 And afterward, to wit, on the 15th day of April, 1897, there was issued out of said court a *subpœna ad respondendum*, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Subpœna ad Respondendum.

The President of the United States of America to The Oregon & California Railroad Company, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of June next, which will be the 7th day of June, A. D. 1897, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein The United States is complainant and you are defendant, and further to do and re-
10 ceive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said district, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[Seal of U. S. Circuit Court, District of Oregon.]

J. A. SLADEN, *Clerk.*

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

11 *Return to Subpœna ad Respondendum.*

UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

I hereby certify that on the 15th day of April, 1897, at Portland, Multnomah county, in said district I duly served the within *sub-*

pœna ad respondendum upon the therein named, the Oregon & California Railroad Company, by delivering to R. Koehler, vice-president and general manager thereof, personally a true copy of said *subpœna ad respondendum* duly certified to me as United States marshal, together with a copy of the complaint in the within-entitled action duly certified to by Daniel R. Murphy, United States attorney.

HENRY C. GRADY,
United States Marshal,
By H. H. HENDERSON, *Deputy.*

(Endorsed:) No. 2,388. In the circuit court of the United States, for the district of Oregon. In equity. The United States *vs.* The Oregon & California Railroad Company. *Subpœna ad respondendum.* Returned and filed April 15, 1897. J. A. Sladen, clerk. By G. H. Marsh, deputy clerk.

12 And afterward, to wit, on the 7th day of June, 1897, there was duly filed in said court a præcipe for appearance of defendant, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon. In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Præcipe for Appearance of Defendant.

The clerk of the above-mentioned court will please enter the appearance herein of the defendant Oregon & California Railroad Company, by the undersigned, its attorneys and counsel.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for Defendant.

WM. F. HERRIN,
Counsel for Defendant.

Filed and entered June 7, 1897.

J. A. SLADEN,
Clerk U. S. Circuit Court, District of Oregon.

13 And afterward, to wit, on Thursday, the 1st day of July, 1897 the same being the 69th judicial day of the regular April term of said court—present the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. July 1, 1897.

Order Extending Time for Defendant to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant, it is ordered that the time in which said defendant is allowed to plead herein be, and it is hereby, extended to Monday, August 2, 1897.

14 And afterward to wit, on Friday the 23d day of July, 1897, the same being the 89th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD CO. } No. 2388. July 23, 1897.

Order Extending Time for Defendant to Plead.

Now, at this day, on motion of Mr. Charles J. Schnabel, assistant United States attorney it is ordered that the time heretofore allowed the defendant herein to plead in this cause be, and the same is hereby, extended to the rule day in September, 1897.

15 And afterward, to wit, on the 23d day of August, 1897, there was duly filed in said court demurrer to the bill of complaint herein, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Oregon. In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Demurrer to Bill of Complaint.

The demurrer of the defendant, The Oregon & California Railroad Company, to the bill of complaint of The United States, complainant in the above-entitled suit.

The defendant demurs to the complainant's bill of complaint, and for causes of demurrer shows:

1. The said bill does not make out or show such cause or causes

as do, or ought to, entitle the complainant to the relief prayed, or any relief, from or against this defendant.

2. It is not shown that the complainant has any interest in the relief sought.

3. It appears by the said bill that the patent which it asks
16 the cancellation of was issued to the defendant by the complainant on July 12th, 1871; and that this suit is barred by the provisions of section 382 of the Code of Civil Procedure of the State of Oregon.

4. The said bill shows such delay and lapse of time after the patent complained against was issued before this suit was brought, as that a court of equity will disfavor the suit, and refuse to extend relief from the matters and things set forth in the said bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant demurs thereto; and humbly prays the judgment of this honorable court whether it shall be compelled to make answer to the said bill, or any part thereof, and that it be hence dismissed.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WM. F. HERRIN,
Counsel for the Defendant.

STATE OF OREGON, } ss:
County of Multnomah, }

George H. Andrews makes oath and says that he is the secretary of the defendant, The Oregon & California Railroad Company; and that the foregoing demurrer is not interposed for delay.

GEO. H. ANDREWS.

17 Subscribed and sworn to before me on August 23d, 1897.
[SEAL.] DAVID LORING,
Notary Public.

Due legal service of the within demurrer, by duly certified copy, is hereby acknowledged this 23d day of August, 1897, at Portland, Oregon.

DANIEL R. MURPHY,
Per SCHNABEL,
United States Attorney.

Filed August 23, 1897.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on Monday, the 4th day of October, 1897, the same being the 1st judicial day of the regular October, 1897,

term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. October 4, 1897.

Order Setting Cause for Hearing.

Now, at this day, comes the plaintiff herein by Mr. Daniel
18 R. Murphy, United States attorney, and the defendant by Mr. Wm. T. Muir, of counsel, and thereupon, on motion of said plaintiff, it is ordered that the final hearing of this cause be, and the same is hereby, set for Friday, October 22, 1897.

And afterward, to wit, on Monday, the 11th day of October, 1897, the same being the 7th judicial day of the regular October, 1897, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD CO. } No. 2388. October 11, 1897.

Order Continuing Hearing.

Now, at this day, comes the defendant by Mr. Wm. T. Muir, of counsel, and moves the court for a continuance of the trial of this cause, heretofore set for Friday, October 22, 1897, and it appearing to the court that such continuance is agreeable to both parties, it is ordered that the trial of this cause be, and it is hereby, continued until the further order of the court.

19 And afterward, to wit, on Thursday, the 9th day of December, 1897, the same being the 58th judicial day of the regular October, 1897, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. December 9, 1897.

Order Continuing Hearing, etc.

Now, at this day, comes the plaintiff herein by Mr. Charles J. Schnabel, assistant United States attorney, and, thereupon, on motion of said plaintiff, and upon stipulation of the parties filed herein, it is ordered that the defendant herein be, and it is hereby allowed sixty days, after the making and filing of a proposed stipulation as to facts in another cause between the same parties in this court, numbered 2,405, in which to take its testimony herein; and it is further ordered that the hearing of the demurrer of the defendant to the bill of complaint herein be, and the same is hereby, continued until the day or days to be hereafter set for the hearings in certain causes in this court, between the same parties as hereto, said causes being numbered 2,272, 2,273 and 2,405, according to the convenience of the court.

And afterward, to wit, on Friday, the 3d day of March, 1899, the same being the 126th judicial day of the regular October, 1898, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. March 3, 1899.

Order Setting Demurrer for Hearing.

Now, at this day, comes the plaintiff by Mr. John H. Hall, United States attorney, and the defendant by Mr. Wm. T. Muir, of counsel, and thereupon, on motion of said plaintiff, it is ordered that the hearing of this cause, upon the demurrer to the bill of complaint herein be, and it is hereby, set for Monday, May 15, 1899.

And afterward, to wit, on Monday, the 15th day of May, 1899, the same being the 30th judicial day of the regular April, 1899, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Co. } No. 2388. May 15, 1899.

Record of Hearing on Demurrer and Order Allowing Time to File Briefs.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. J. S. Moseby, who, upon motion of said United States attorney, is permitted to appear for said defendant in this cause, and Mr. W. D. Fenton, of counsel, and, thereupon, this cause comes on to be heard upon the demurrer to the bill of complaint herein, and the court, having heard the arguments of counsel, will advise thereof.

And thereupon, it is ordered that counsel for the respective parties hereto be, and they are hereby, allowed sixty days from this date in which to file their briefs herein.

22 And afterward, to wit, on Thursday, the 31st day of August, 1899, the same being the 121st judicial day of the regular April, 1899, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILroad Company. } No. 2388. August 31, 1899.

Order Extending Time to File Briefs.

Now, at this day, on motion of Mr. Wm. T. Muir, of counsel for the defendant herein, and upon stipulation of the parties hereto, filed in cause No. 2,272, entitled as above, it is ordered that said defendant be, and it is hereby, allowed until, and including, Monday, September 18, 1899, in which to file its brief herein.

23 And afterward, to wit, on Friday, the 27th day of April, 1900, the same being the 16th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD Company. } No. 2388. April 27, 1900.

Order Overruling Demurrer and Allowing Time to Plead.

This cause was heard upon the demurrer to the bill of complaint herein, and was argued by Mr. John H. Hall, United States attorney, of counsel for the plaintiff herein, and by Mr. W. D. Fenton and Mr. John S. Moseby, of counsel for the defendant, and thereupon the court took the same under advisement, and having duly considered the same,

It is now ordered and adjudged that said demurrer be, and the same is hereby, overruled; and it is further ordered that said defendant be, and it is hereby, allowed ten days in which to further move or plead herein.

24 And afterward, to wit, on Monday, the 7th day of May, 1900, the same being the 24th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Company. } No. 2388. May 7, 1900.

Order Extending Time to Plead.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. W. D. Fenton, of counsel, and thereupon, on motion of said defendant, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, extended ten days.

25 And afterward, to wit, on Thursday, the 17th day of May, 1900, the same being the 33d judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. May 17, 1900.

Order Extending Time to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the above-named defendant, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

26 And afterward, to wit, on Monday, the 28th day of May, 1900, the same being the 42d judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. May 28, 1900.

Order Extending Time to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant herein, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

27 And afterward, to wit, on the 29th day of May, 1900, there was duly filed in said court plea of defendant to the bill of complaint herein, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Oregon. In Equity.

UNITED STATES, Complainant,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Plea of Defendant to Amended Bill of Complaint.

Plea of the defendant, Oregon & California Railroad Company, to the amended bill of complaint of the complainant, filed by leave of court.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill o

complaint to be true, in such manner or form as the same are therein stated or alleged, for plea to the whole of said amended bill of complaint, says:

28 On January 29th, 1870, the Secretary of the Interior duly accepted and approved the map referred to in paragraph 3 of the amended bill, and prior to July 12th, 1871, this defendant, under direction of the Secretary of the Interior, selected the lands described in paragraph 4 of the amended bill, and fully paid all costs of surveying, selecting, and patenting the same, amounting to more than fifteen dollars; which amount the complainant then received and has ever since retained, without offer to return the same to defendant.

John W. Hines, mentioned in paragraph 4 of the amended bill, abandoned the land described in paragraph 4 of the amended bill, without having paid for it or resided thereon four years; nor was he residing thereon at the time this defendant selected the same, as aforesaid.

All of which matters and things this defendant avers to be true, and pleads to the complainant's amended bill; and prays the judgment of this honorable court whether it ought to make any other or further answer to the said amended bill; and asks to be hence dismissed, with its costs and charges in this behalf, most wrongfully sustained.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

29 STATE OF OREGON, } ss:
County of Multnomah, }

George H. Andrews makes solemn oath that he is the secretary of the defendant Oregon & California Railroad Company; that the foregoing plea is true in point of fact, and not interposed for delay.

GEO. H. ANDREWS.

Subscribed and sworn to before me on May 17th, 1900.
[SEAL.] R. A. LEITER,
Notary Public in and for Multnomah County, Oregon.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

WM. F. HERRIN,
Counsel for the Defendant.

STATE OF OREGON, } ss:
Multnomah County, }

Due service of the within plea is hereby admitted this 29th day of May, 1900.

JOHN H. HALL,
By S.,
United States Attorney.

Filed May 29, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

30 And afterward, to wit, on Friday, the 15th day of June, 1900, the same being the 58th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Complainant, *vs.* THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388. June 15, 1900.

Final Decree.

This cause was heard by the court upon the sufficiency of the defendant's plea to the bill of complaint in this cause, heretofore filed herein, and was argued by Mr. John H. Hall, United States attorney, and by J. S. Moseby and Mr. W. D. Fenton, of counsel for the above-named defendant, and the court having taken the same under advisement, and having overruled said plea, and defendant
31 having declined to plead further herein, and after examination of the facts set forth in plaintiff's bill of complaint, and, upon motion of Mr. John H. Hall, United States attorney,

It is ordered, adjudged, and decreed that the patent issued by President of the United States on the 12th day of July, 1871, to defendant, The Oregon & California Railroad Company to the south ½ of the northeast ¼, and the northwest ¼ of the southeast ¼, the northeast ¼ of the southwest ¼, and the southeast ¼ of the northwest ¼ of section 1, township 2 south, of range 5 west of the Willamette meridian, be, and the same is hereby, set aside, and decreed to be null and void and of no effect, and the legal title thereto restored to the United States, and that plaintiff recover, of and from defendant, its costs and disbursements of this suit taxed at $—.

CHARLES B. BELLINGER, *Judge.*

Filed June 15, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court petition for appeal and supersedeas, in words and figures as follows, to wit:

32 In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Petition for Allowance of Appeal and Supersedeas.

The defendant in the above-entitled suit, conceiving itself aggrieved by the decree made and entered herein on June 15th, 1900, granting unto the complainant the relief prayed for in its bill of complaint, hereby appeals from the said decree to the United States circuit court of appeals for the ninth circuit; and the defendant files herewith its assignment of errors asserted and intended to be urged on appeal.

The defendant prays an order of this court allowing its appeal, and directing that transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit;
and that by the order of this court all further proceedings in
33 this case, and upon said decree, may be stayed pending this appeal, upon its (defendant's) giving a good and sufficient bond to be approved by this court.

Dated and signed on August 11th, 1900.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for Defendant.

WM. F. HERRIN,
Counsel for Defendant.

Filed August 11, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Assignment of Errors.

In connection with its petition for allowance of appeal
34 herein, the defendant makes and files this assignment of errors made by the court, in its decree entered in this cause on June 15th, 1900.

The bill and plea, taken together, show the land in suit properly patented unto the defendant, as indemnity land of the grant made to it (defendant) by the act of Congress approved July 25th, 1866, unless issue of the patent was unlawful because of the donation notification filed on November 22d, 1853, by John W. Hines. In adjudging and decreeing the defendant's patent null, void, set aside, and canceled, and title to the lands thereof restored to the United States, the court erred as follows:

1. Because, as shown by the plea, the said John W. Hines did not reside on the land for four years, nor pay for the land; hence he was at no time qualified to file a donation notification.

2. Because, as shown by the plea, John W. Hines abandoned the land prior to the defendant's selection thereof, without having resided on it for four years or paid for it; hence, the land being within indemnity limits of the defendant's grant, the defendant's selection thereof was lawfully made.

3. Because, as shown by the plea, John W. Hines' donation notification was unlawfully filed, for that he abandoned the land without having resided on it for four years or paid for it; and the proper land officers of the United States ought to have canceled the notification in so far as, if at all, it constituted a record, at or prior to the time of the defendant's selection.

4. Because, as shown by the plea and admitted by the United States in setting the plea for argument, John W. Hines abandoned the land prior to the defendant's selection, without having resided on the land for four years or paid for it; and such facts make it the duty of the proper officers of the United States to cancel the donation notification. Hence it would be inequitable to cancel the defendant's patent.

5. Because approval of the defendant's selection was, in effect, cancellation of the Hines' donation notification.

6. Because the filing of Hines' donation notification constituted no bar to the defendant's indemnity selection of the land.

Wherefore, the defendant (appellant) prays that the decree entered herein may be reversed, that the complainant's bill be dismissed, and that it (defendant) be given the relief prayed.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

Filed August 11, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on Saturday, the 11th day of August, 1900, the same being the 106th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

36 In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Order Granting Appeal and Supersedeas.

Having considered the defendant's petition for the allowance of appeal and supersedeas from the decree made and entered herein on June 15th, 1900, and the assignment of errors filed therewith, on motion of Mr. Wm. D. Fenton, of counsel for the defendant, the appeal of the defendant is allowed as prayed, upon giving a bond to be approved by this court, in the sum of five hundred dollars, which bond shall operate as a supersedeas from the date of its approval.

And it is further ordered that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, be sent by the clerk of this court, to the United States circuit court of appeals, ninth circuit, at San Francisco, California.

Dated and signed on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 11, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

37 And afterward, to wit, on the 13th day of August, 1900, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Bond on Appeal.

We, R. Koehler and C. G. Sutherland, each of Portland, Oregon, are held and firmly bound unto The United States, complainant above named, in the sum of five hundred dollars, to be paid unto the said complainant; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The Oregon & California Railroad Company, defendant above named, has been allowed an appeal to the United States circuit court of

appeals for the ninth circuit, and supersedeas, from the decree entered in the above-entitled suit on June 15th, 1900; and the condition of this obligation is, that if the said Oregon & California Railroad Company shall prosecute its appeal to effect, and answer the
38 costs taxed in the decree appealed from, together with all damages, interest and cost of such appeal and supersedeas, if it (defendant) fails to make its said appeal good, thence this obligation to be void, otherwise to remain in full force.

Dated, signed and sealed on August 11th, 1900.

R. KOEHLER. [SEAL.]
C. G. SUTHERLAND. [SEAL.]

STATE OF OREGON, *County of Multnomah,* } ss:

R. Koehler and C. G. Sutherland, being duly sworn, each for himself says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of, and freeholder within the State and district of Oregon, and am worth the sum of five hundred dollars over and above all my just debts and liabilities, in property situated in said district, exclusive of property exempt from execution.

R. KOEHLER.
C. G. SUTHERLAND.

Subscribed and sworn to before me on August 11th, 1900.

[SEAL.] DAVID LORING,
Notary Public in and for Multnomah County, Oregon.

The foregoing bond approved, on August 13th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 13, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

39 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, J. A. Sladen, clerk of the circuit court of the United States, for the district of Oregon, in obedience to the foregoing order allowing appeal, do hereby certify that the foregoing pages, numbered from 3 to 55, inclusive, contain a full, true, and correct transcript of the record and proceedings had in said court, in cause No. 2,388, The United States, plaintiff, against The Oregon and California Railroad Company, defendant and appellant, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is twenty $\frac{40}{100}$ dollars, and that the same has been paid by the appellant, The Oregon and California Railroad Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this 30th day of August, 1900.

[SEAL.] J. A. SLADEN, *Clerk.*

(Endorsed:) No. 640. Transcript of record. In the United States circuit court of appeals, for the ninth circuit. The Oregon and California Railroad Company, appellant, *vs.* The United States, appellee. Appealed from the circuit court of the United States, for the district of Oregon. Filed September 1st, 1900. F. D. Monckton, clerk.

40 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 641.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 639.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 640.

Appeals from the circuit court of the United States for the district of Oregon.

Before Ross and Morrow, circuit judges, and Hawley, district judge.

THE COURT:

On the authority of Hewitt *v.* Schultz, Supreme Court Reporter, February 15, 1901, p. 309: Grinnell *v.* R. R. Co., 103 U. S. 739: St. Paul etc. R. R. Co., *v.* Winona etc. R. R., 112 U. S. 720: Sioux City etc. R. R. *v.* Chicago, Milwaukee etc. R. R., 117 U. S. 406; U. S. *v.* Missouri, Kansas & Texas R. R., 141 U. S. 374, the judgment in each of the above-entitled cases is affirmed.

(Endorsed:) Opinion. Filed May 16, 1901, F. D. Monckton, clerk.

41 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee.
} No. 640. Decree.

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed and entered May 16, 1901, F. D. Monckton, clerk.

42 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday the 9th day of October in the year of our Lord one thousand, nine hundred and one.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee.
} No. 640.

Upon motion of William Singer, Jr., Esquire, counsel for the appellant, it is ordered that an appeal to the Supreme Court of the United States be and the same is hereby allowed; and that the amount of bond on appeal be and the same is hereby fixed in the sum of $300.

43 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
vs.
UNITED STATES, Complainant and Appellee.
} No. 640. In Equity.

Petition for Appeal.

The above-named defendant, conceiving itself aggrieved by the decree made and entered herein on May 16th 1901, appeals therefrom to the Supreme Court of the United States, for the reasons

specified in its assignment of errors filed herewith; and the defendant prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner further prays, that upon giving a good and sufficient bond to be approved by this court, all proceedings in this cause, and upon the said decree, may be stayed pending its appeal.

WM. D. FENTON &
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendants.

44 *Order Allowing Appeal.*

The foregoing claim of appeal, and prayer for supersedeas, are allowed and granted; the supersedeas to take effect upon the filing of a good and sufficient bond in the sum of five hundred dollars, conditioned that the appellant shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its appeal good.

It is further ordered that a transcript of the record, proceedings and papers upon which the said decree was made, under the seal of this court and the hand of its clerk, be sent to the Supreme Court of the United States.

San Francisco, October 15th, 1901.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Petition for appeal and order allowing appeal. Filed October 16, 1901, F. D. Monckton, clerk.

45 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
vs.
UNITED STATES, Complainant and Appellee.
} No. 640. In Equity.

Assignment of Errors.

The above-named defendant, by the undersigned, its attorneys and counsel, in connection with its petition for allowance of appeal herein, says that the decree in the above-entitled cause, made and entered on May 16th, 1901, is erroneous and against its just rights in the following particulars; that is to say:

The bill and plea, taken together, show the land in suit properly patented unto the defendant, as indemnity land of the grant made to it (defendant) by the act of Congress approved July 25th 1866, unless issue of the patent was unlawful because of the donation notification filed on November 22nd 1853, by John W. Hines. In

adjudging and decreeing the defendant's patent null, void, set aside, and canceled, and title to the lands thereof restored to the United States, the court erred as follows:

1st. Because, as shown by the plea, the said John W. Hines did not reside on the land for four years, nor pay for the land; hence
46 he was at no time qualified to file a donation notification.

2nd. Because, as shown by the plea, John W. Hines abandoned the land prior to the defendant's selection thereof, without having resided on it for four years or paid for it; hence, the land being within indemnity limits of the defendant's grant, the defendant's selection thereof was lawfully made.

3rd. Because, as shown by the plea, John W. Hines' donation notification was unlawfully filed, for that he abandoned the land without having resided on it for four years, or having paid for it; and the proper land officers of the United States ought to have canceled the notification in so far as, if at all, it constituted a record, at or prior to the time of the defendant's selection.

4th. Because, as shown by the plea and admitted by the United States in setting the plea for argument, John W. Hines abandoned the land prior to the defendant's selection, without having resided on the land for four years, or having paid for it; and such facts make it the duty of the proper officers of the United States to cancel the donation notification. Hence it would be inequitable to cancel the defendant's patent.

5th. Because approval of the defendant's selection was, in effect, cancellation of the Hines donation notification.

6th. Because the filing of Hines' donation notification constituted no bar to the defendant's indemnity selection of the *the* land.

Wherefore the defendant (appellant) prays that the said decree be reversed; and that the circuit court of the United States for the district of Oregon be directed to enter a decree dismissing said suit.

WM. D. FENTON &
WM. SINGER, JR.,
Attorneys for the Appellant.

WM. F. HERRIN,
Counsel for the Appellant.

47 (Endorsed:) Assignment of errors. Filed October 16, 1901, F. D. Monckton, clerk.

48 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant, *vs.* UNITED STATES, Complainant and Appellee. } No. 640. In Equity.

Bond on Appeal.

We, N. T. Smith and J. H. Sharpe, both of the city and county of San Francisco, State of California, are held and firmly bound

unto the United States of America, in the sum of five hundred (500) dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The above-named defendant and appellant has been allowed an appeal to the Supreme Court of the United States, and a supersedeas, from the decree entered in the above-entitled court and cause on May 16th 1901; and the condition of this obligation is, that if the appellant shall prosecute its said appeal to effect, and answer all damages and costs if it fails to make its appeal good, then this obligation to be void; otherwise to remain in full force.

Dated, signed and sealed on October 15th 1901.

N. T. SMITH. [SEAL.]
J. H. SHARPE. [SEAL.]

49 Acknowledged before me on October 15th 1901.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

N. T. Smith and J. H. Sharpe, being duly sworn, each for himself deposes and says: I am a householder in the northern district of California, and am worth the sum of five hundred (500) dollars, exclusive of property exempt from execution, and over and above my just debts and liabilities, in property within said district.

N. T. SMITH.
J. H. SHARPE.

Subscribed and sworn to before me on October 15th 1901.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is approved.

WM. W. MORROW, *Judge.*

(Endorsed:) Bond on appeal. Filed October 16, 1901, F. D. Monckton, clerk.

50 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee. } No. 640.

Certificate of Clerk of C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing forty-

nine (49) pages, numbered from one (1) to forty-nine (49), inclusive, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same together constitute the transcript upon appeal to the Supreme Court of the United States herein.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 28th day of October, A. D. 1901.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

51 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on December 12th. 1901, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Oregon & California Railroad Company are appellants and The United States of America is appellee, to show cause, if any there be, why the decree rendered on May 16th, 1901, by the said United States circuit court of appeals against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of San Francisco, on October 15th 1901.

WM. W. MORROW, *Judge.*

Due service by copy of the foregoing citation is admitted on October 21st 1901.

JOHN H. HALL,
M.,
United States Attorney for Oregon, of Counsel for the Appellee.

52 [Endorsed:] No. 640. U. S. circuit court of appeals, ninth circuit. Oregon & Cal'a Railroad Co. *vs.* United States. Citation. Filed October 23rd 1901. F. D. Monckton, clerk. Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal. att'y for —

Endorsed on cover: File No. 18,310. U. S. C. C. of appeals, 9th circuit. Term No. 188. The Oregon and California Railroad Company, appellant, *vs.* The United States. Filed November 8th, 1901.

Office Supreme Court U. S.
FILED
FEB 25 1903
JAMES H. McKENNEY,
Clerk

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 188.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

vs.

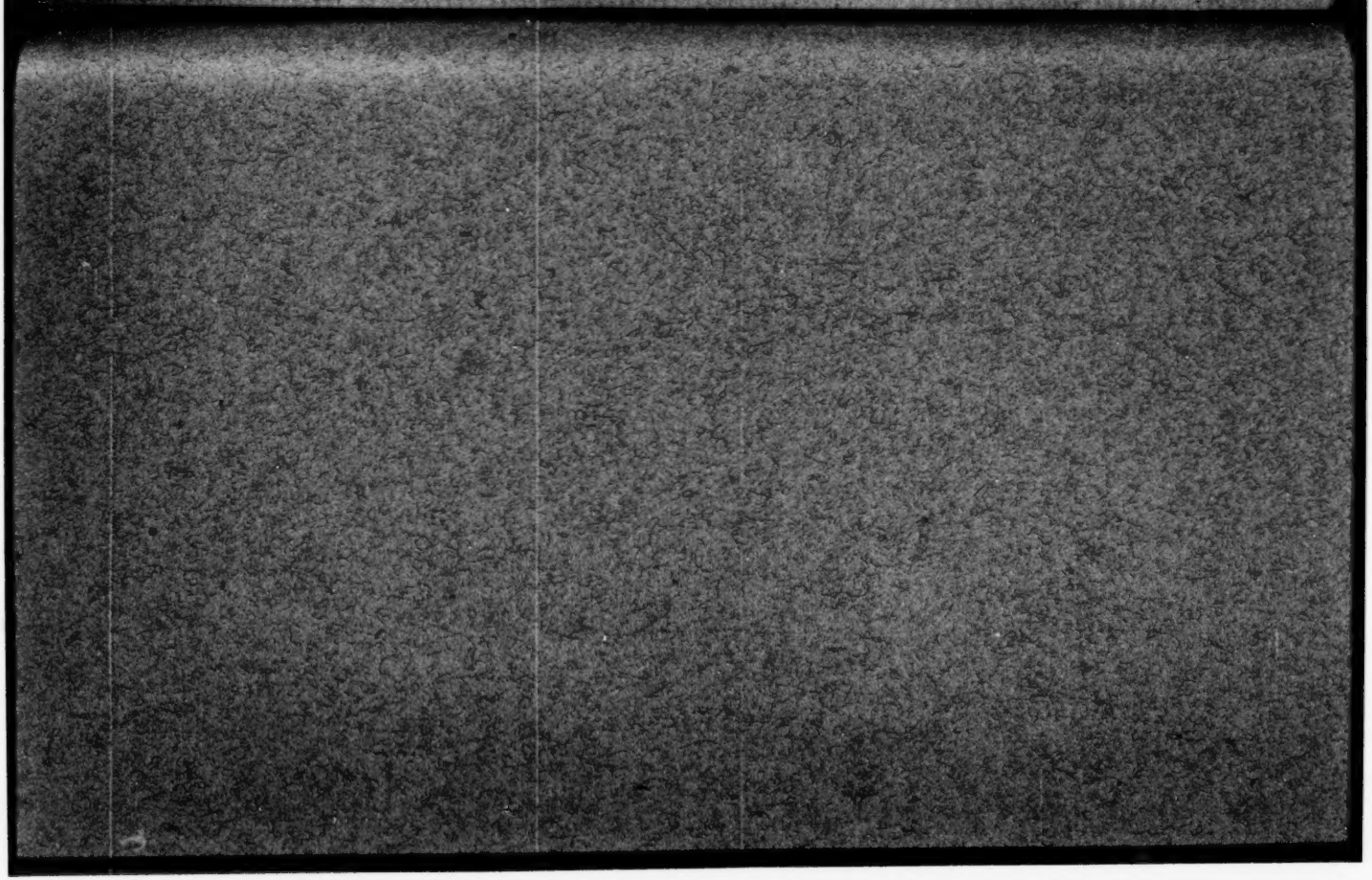
THE UNITED STATES,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT.

MAXWELL EVARTS,
Of Counsel for the Appellant.

C. G. SPROCKETT, Walker and Center Streets, N. Y.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 188.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT.

Statement.

On the 12th day of July, 1871, the Oregon and California Railroad Company received a patent from the United States for the land in controversy (Record, p. 3) which is within the indemnity limits of its grant under the Act of Congress approved July 25, 1866, and entitled "An Act Granting Lands to Aid in the Con-

struction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California to Portland, in Oregon" (14 U. S. Stat., 239). The provisions of this act and the rights of the appellant thereunder are set forth at length in the brief of the appellant in the case of the Oregon and California Railroad Company vs. The United States, No. 186 on the present docket, to which we respectfully refer the Court.

On the 22d day of November, 1853, under the provisions of the Act of Congress approved September 27, 1850, and entitled "An Act to Create the Office of Surveyor-General of the Public Lands in Oregon, and to Provide for the Survey and to Make Donations to Settlers of the said Public Lands" (9 U. S. Stat., 496), and the act amendatory thereof, approved February 14, 1853 (10 U. S. Stat., 158), one John W. Hines duly filed a donation notification embracing, among other lands, the land in dispute (Record, p. 3).

Hines, abandoned the land without residing thereon for four years and without paying therefor (Record, p. 14).

On the 26th day of July, 1894, Congress passed an act (28 U. S. Stat., 122) giving to donation claimants and their heirs, devisees and

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grantees until the 1st of January, 1896, within which to make and file final proofs and fully establish their rights to donations of lands under the acts above-mentioned of 1850 and 1853. Neither Hines nor any descendant or grantee from him took any proceeding under the provisions of the Act of 1894.

After the expiration of the limitation fixed by the Act of 1894 and on the 15th of April, 1897, the government filed its bill in this cause (Record, p. 2) seeking to set aside and cancel the patent for the land in controversy issued to the appellant now more than thirty years ago.

The suit was brought upon the theory that a donation claim filed against the land and then abandoned nearly fifty years ago withdrew the land from selection by the railroad.

On the 29th of May, 1900, a plea to this bill was filed by the railroad company (Record, p. 13) and the cause was heard upon the bill and plea. The plea was overruled and the defendant having declined to plead further a decree was entered canceling the patent issued by the United States for the land in dispute (Record, p. 15).

From this decree an appeal was taken by the railroad company to the United States Circuit

Court of Appeals for the Ninth Circuit, which court on the 16th of May, 1901, affirmed the judgment below upon the authority of Hewitt vs. Schultz, 180 U. S., 139 (Record, p. 20).

From the judgment of the Circuit Court of Appeals the appeal to this court has been taken (Record, p. 21).

Specification of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court entered June 15, 1900, and directing said court to render a decree dismissing the bill of the United States.

II. In deciding that the United States was entitled to a decree vacating and setting aside the patent to the lands in controversy issued to the Oregon and California Railroad Company July 12, 1871.

III. In not deciding that the appellant the Oregon and California Railroad Company was entitled to make the selection of the lands in controversy in 1871 and to receive a patent therefor, upon the ground that the status of such lands, at the time of their selection, determined the right of the railroad thereto, and that at such

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time, the title of said land was in the United States, and that it was then open to selection under the grant of July 25, 1866.

IV. In not deciding that the donation claimant Hines by his failure to reside upon the land for four years or to pay therefor acquired no interest whatever in the land in dispute and that it was public land of the United States and open to selection at the time of its selection by and patenting to the railroad company.

V. In not dismissing the bill of complaint upon the ground that a cancellation of the patent would simply restore the land to the public domain and throw it open to selection by the railroad, and that it was inequitable to cancel a patent more than thirty years old, simply for the purpose of issuing a new patent for the same land to the same patentee.

ARGUMENT.

FIRST POINT.

The land in dispute was public land and open to selection at the time it was selected by and patented to the appellant.

The important question presented in this case is whether the land involved upon this appeal

was in 1871 public land of the United States, open to selection by the railroad, and this question must be answered in the affimative, unless the title thereto was in some way affected by the filing, in 1853, of a donation notification covering the land which was subsequently abandoned.

It is too well settled by the decisions of this court to require discussion that the status of indemnity lands at the time of selection by the railroad is what determines its right thereto (Ryan vs. C. P. R. R. Co., 99 U. S., 388). The condition of the land in the past is of no consequence. The fact that twenty years before, a claimant had an inchoate right which might have developed into a complete and perfect title to the land upon the performance by such claimant of certain conditions, has no relation to the railroad's right of selection, so long as the time for the performance of such conditions by the claimant has long since expired. The right of the railroad depends solely upon the status of the lands at the time of selection unaffected in any way by what might have been if certain contingencies (no longer possible at the date of selection) had taken place twenty years before.

Applying this established law to the facts in

the present case we find that the lands in dispute were clearly open for selection by the railroad in 1871, unless it be that this right was lost by the donation notification filed and abandoned in 1853 nearly twenty years before. Whether the right of selection was thus lost depends upon whether Hines, the notification claimant, acquired by his acts any title to the land, and for an answer to this question it is necessary to refer to the Acts of Congress, under which he made his claim.

By the fourth section of the Oregon Donation Act (9 U. S. Stat., 496), it was provided as follows:

> "There shall be, and hereby is, granted to every white settler or occupant of the public lands * * * *who shall have resided upon and cultivated the same for four consecutive years*, and shall otherwise conform to the provisions of this Act, the quantity of one-half section, or three hundred and twenty acres of land."

The first section of the Amendatory Act of 1853 (10 U. S. Stat., 158), provided that settlers under the former act,

> "in lieu of the term of continued occupation after settlement, as provided by said Act,

> shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the Surveyor-General of said Territory at the rate of one dollar and twenty-five cents per acre for the lands so claimed."

Hines abandoned his notification claim and neither resided upon the land for four years as required by the Act of 1850 nor paid any money for it as provided by the Act of 1853. By the mere filing of his notification claim Hines certainly acquired no title to the land. The grant by its terms was not to anyone who filed a notification claim, *but to one who shall have resided and cultivated the land for four consecutive years.*

In Hall vs. Russell, 101 U. S., 503, the Oregon Donation Act was construed and the conclusion of the court was stated at page 512, as follows:

> "We conclude, therefore, that under sect. 4 there was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation, and performing such other acts in the meantime as the statute

required in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public lands, but not a grantee. His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language Congress has used to make known its will."

In Vance vs. Burbank, 101 U. S., 514, the Oregon act was again construed by this court, and in the course of its opinion the Hall case was referred to as follows at page 520:

"In Hall vs. Russell (*supra*, p. 503), we held that a grant to a settler did not take effect as against the United States, so as to pass anything more than a possessory right in the lands occupied, until the completion of the four years' residence and cultivation, and a full compliance with all the other conditions of the act. The statutory grant was to the settler; but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband. *If he abandoned the possession before he became entitled to the grant, her estate in the land was gone as well as his.*"

Again, in Maynard vs. Hill, 125 U. S., 190, the Act of 1850 was discussed, and it was held that:

> "Under the Oregon Donation Act, 9 Stat., 496, c. 76, the statutory grant took effect as a complete grant only on the termination of the four years' term of residence and cultivation; and the wife of a resident settling under the act as a married man, who was divorced from him after the commencement of his settlement, but before its completion, took no interest under the act in the title subsequently acquired by him. He had, previous to that time, no vested interest in the land, only a possessory right,—a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him."

From these decisions it is clear that Hines by the abandonment of his claim and his failure to occupy the land for the four consecutive years following his entry as required by the statute acquired no title to the land, but the title remained in the United States and the land continued to be part of the public domain. In any event whatever interest in the land (if any) Hines acquired by the filing of his donation notification at once reverted to the government upon his abandonment of the land.

The claim of Hines had been abandoned nearly twenty years before the selection of the land by the railroad. He then had no right under his donation notification for the reason that he had not occupied the land for the four consecutive years which followed the filing of his claim. He had, therefore, no more right or claim to the land when selected by the railroad, than an absolute stranger. He could not file his claim under the act one year, and then five years thereafter go upon the land and live upon it four years consecutively. He would acquire no right to the land by so doing for the reason that the act as we understand it required the residence to be four consecutive years immediately succeeding the filing of the donation claim. Having failed to so reside upon the land, he, therefore, lost all rights to the land as soon as he abandoned his claim and could acquire no further interest in it except by thereafter filing a new donation notification. If, therefore, we construe this law rightly the donation notification of Hines at the time of the selection of the land by the railroad had been canceled years before by his failure to reside upon the land for the four years following the filing of

his claim and could not be revived and he had no more interest in the land than an entire stranger thereto.

The point which we desire to make is well brought out in the case of Hall vs. Russell (*supra*) where the Court said, at page 513:

> "As the law required full four years' residence by the person who claimed the grant, if no provision and [had] been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler if the law authorizing new settlements still remained in force."

If the land became vacant and open for a new settlement by the death of the claimant (except for the provision of the statute as to the rights of his heirs), it would seem to follow that an abandonment of the land by a claimant before the four years' residence would result in leaving the land vacant and open for a new settlement. In other words, the mere fact of abandonment by Hines before the end of the four years restored the land to the public domain, just as if no donation notification had ever been filed.

We, therefore, respectfully submit that the donation claimant Hines acquired no title what-

ever to the land in dispute when he filed his notification in 1853, but merely the right to acquire a title thereto by four consecutive years of residence upon the land immediately succeeding the filing of his notification; that such notification was cancelled by its abandonment by Hines, and his failure to reside upon the land as required by statute, and that the land in 1871, when selected by the railroad, was and had been for a long time vacant public land of the United States open to selection under the grant to the appellant, and the right to make the selection was in no way affected by the donation notification filed and abandoned twenty years before.

SECOND POINT.

The right of the railroad to select the land in dispute was not affected in any way by the Act of Congress of July 26, 1894 (28 U. S. Stat., 122).

It may be argued that the Act of 1894 (Appendix, p. XIV) extended the rights of a donation claimant until the first day of January, 1896. An examination of this act, however, will dis-

close that it gave no right to a donation claimant, except the right to file final proof of a title acquired by four years' residence upon the land, as provided by the statute of 1850. The Act of 1894 did not purport in any way to give any right to a donation claimant or his heirs, in a case where the donation claimant had abandoned his claim and had not resided upon the land the required four years. To put it in another way, the intention of Congress in passing the Act of 1894 was not to enlarge the rights of donation claimants, but simply to permit any claimant who had acquired title to the land by the completion of the required residence but had not for any cause made final proof thereof, to make such final proof before a given day. A mere reading of this act will show that this is all which it purports to permit.

In the last section of this act we find the following provision:

> "Nothing in this Act contained shall be construed to impair or affect any adverse claims arising under any law of the United States other than said Donation Act, to or in respect of the lands in this act referred to."

This sentence simply means that any adverse claim to the public lands of Oregon which has arisen during the laches and negligence of any donation claimant to make his final proof, shall not be affected by the permission given by the Act of 1894. In other words, negligent and careless donation claimants are given the privilege of filing final proofs, if no other rights, which have grown up during and have been made possible by such negligence, will be affected or impaired thereby.

We, therefore, confidently submit, (1) that the Act of 1894 was never intended by Congress to permit a donation claimant to make his final proof, except one who had acquired a title to the land by residing thereon for four years as required by the Act of 1850, or by paying therefor as provided by the Act of 1853, and that this act was never intended to enable a claimant who had resided on the land for less than four years and then abandoned it, to undertake to perfect his claim; (2) that even if this law should not be given the construction for which the appellant contends and it should be held that a claimant who had not resided upon the land as required by statute could still file his final proofs, yet

even under such a construction the claimant would not be permitted under the last section of the act to make such proof, if by so doing he impaired or affected any claims to the land arising between the time he first settled upon it and the time when he sought to make final proof of his claim.

THIRD POINT.

If the patent to the land in dispute was canceled and the land restored to the public domain, the railroad company would be free to again select it and demand from the United States a new patent therefor. This is a sufficient ground for dismissing the bill.

The indemnity lands under this grant are insufficient to make good the losses within the place limits. Therefore if this land should be restored to the public domain, it would at once be taken by the railroad to make good its losses within the primary limits of its grant. It is hardly the province of a court of equity to direct the entry of a decree which will at once be nullified and properly nullified by the defendant

and the situation of the parties restored to the identical position which existed prior to the commencement of the suit.

In the case of United States vs. Central Pacific R. R. Co., 26 Fed., 479, a bill was filed by the United States to set aside patents for public lands alleged to have been issued by mistake under the same congressional grant as the one now under consideration. The bill was dismissed for the reason among others that, if the patent was canceled, the railroad company would have the right to again select the same identical lands. In the course of the opinion Judge Sawyer said, at page 482, as follows:

> * * * "Now, the only difficulty in regard to this patent is that the selection and patent were *premature*. Had the company waited till after the rejection of the Dias claim before selecting, the selection and patent of identically the same lands would have been good. If this selection and patent fail, the defendant has not yet received all the lands to which it is entitled, and it is still entitled to select an equal amount of outside lands, within the prescribed limits, provided a sufficient quantity of unappropriated lands is left for the purpose. *It does*

not appear that anybody else has acquired any interest in these lands patented, and since they are patented it is not probable that any adverse interest in them has been acquired. If this patent should be vacated, therefore, being no longer sub judice, the defendant would now be entitled to select these identical lands to compensate for the loss, and receive another patent for them. The Dias grant having long since been finally rejected, the lands would be now open for selection, in pursuance of the decision in *Ryan's Case. The result might be only the substitution of another patent to the same lands for the one vacated, at a great deal or further trouble and expense, both to the United States and to the respondent.*" * * *

"The vacation of this patent would involve the necessity of issuing another for the same or an equal amount of other lands, if any there be,—of substituting a new patent for the one vacated. *Courts of equity will not do a vain thing,—will not sustain a bill where no injury results from a mere innocent error in fact or law, upon which it is based,—and especially where that error consists merely in doing a little earlier than it should be done a thing entirely proper to be done at the right time, and which, if now*

undone, must be done over again. 'Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts *which are followed by no loss or damage.*' 1 Story, Eq. Jur., 203. Much less will it interfere where no injury results, and there is only a mutual innocent mistake, there being no moral wrong, and where, to correct the mistake in favor of the party complaining, would be inequitable, and work an injury to the other party. Besides, if these lands are now lost, all others open to selection having at this day been disposed of, by reason of a change of circumstances the parties could not be placed *in statu quo.*" 1 Story, Eq. Jur., 138*a*, 138*c*. * * *

In Germania Iron Co. vs. United States, 165 U. S., 379, Mr. Justice BREWER said at page 384:

> "A court might properly decline to set aside a patent when it affirmatively appeared that immediately after such action, it would be the duty of the department to issue a new one."

In United States vs. San Jacinto Tin Co., 125 U. S., 273, the question was discussed as to when

the United States could file a bill to cancel a patent, and the rule was there stated at page 286 as follows:

> "In short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

We, therefore, respectfully submit that even if the court should hold that the land in dispute was not open to selection in 1871 by reason of the donation notification of Hines, notwithstanding his abandonment of the land twenty years before without residing thereon the statutory period, yet upon the authorities which we have just cited, the bill must be dismissed for the reason that a court of equity will not in the words of Judge Sawyer, do a vain thing and order that to be undone which must at once be done over again, and will not direct the cancellation of a patent and the restoration of the land to the public domain, when the railroad would again select it and become entitled to a new patent therefor.

FOURTH POINT.

The judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

MAXWELL EVARTS,
Counsel for Appellant.

APPENDIX.

Act of Congress, Approved September 27, 1850 (9 U. S. Stat., 496).

CHAP. LXXVI. *An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a surveyor-general shall be appointed for the Territory of Oregon, who shall have the same authority, perform the same duties respecting the public lands and private land claims in the Territory of Oregon, as are vested in and required of the surveyor of lands in the United States northwest of the Ohio, except as hereinafter provided.

SEC. 2. *And be it further enacted*, That the said surveyor-general shall establish his office at such place within the said Territory as the President of the United States may from time to time direct; he shall be allowed an annual salary of two thousand five hundred dollars, to be paid quarter-yearly, and to commence at such time as he shall enter into bond, with competent security, for the faithful discharge of the duties of his office. There shall be, and hereby is, appropriated the sum of four thousand dollars, or as much thereof as is necessary for clerk hire in his office; and the further sum of one thousand dollars

per annum for office rent, fuel, books, stationery, and other incidential expenses of his office, to be paid out of the appropriation for surveying the public lands.

SEC. 3. *And be it further enacted*, That if, in the opinion of the Secretary of the Interior, it be preferable, the surveys in said Territory shall be made after what is known as the geodetic method, under such regulations, and upon such terms, as may be provided by the Secretary of the Interior or other Department having charge of the surveys of the public lands, and that said geodetic surveys shall be followed by topographical surveys, as Congress may from time to time authorized and direct; but if the present mode of survey be adhered to, then it shall be the duty of said surveyor to cause a base line, and meridian to be surveyed, marked, and established, in the usual manner, at or near the mouth of the Willamette River; and he shall also cause to be surveyed, in townships and sections, in the usual manner, and in accordance with the laws of the United States, which may be in force, the district of country lying between the summit of the Cascade Mountains and the Pacific Ocean, and south and north of the Columbia River: *Provided, however*, That none other than township lines shall be run where the land is deemed unfit for cultivation. That no deputy surveyor shall charge for any line except such as may be actually run and marked, nor for any line not necessary to be run; and that the whole cost of surveying shall not exceed the rate of eight dollars per mile, for every mile and part of mile actually surveyed and marked.

SEC. 4. *And be it further enacted*, That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a

declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to wife, to be held by her in her own right; and the surveyor-general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon: *Provided*, That no alien shall be entitled to a patent to land, granted by this act, until he shall produce to the surveyor-general of Oregon, record evidence that his naturalization as a citizen of the United States has been completed; but, if any alien, having made his declaration of intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act shall descend to his heirs at law, or

pass to his devisees, to whom, as the case may be, the patent shall issue: *Provided, further,* That in all cases provided for in this section, the donation shall embrace the land actually occupied and cultivated by the settler thereon: *Provided, further,* That all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor, shall be void: *Provided, further, however,* That this section shall not be so construed as to allow those claiming rights under the treaty with Great Britain relative to the Oregon Territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a single grant of land.

SEC. 5. *And be it further enacted,* That to all white male citizens of the United States, or persons who shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said Territory between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three; and to all white male American citizens, not hereinbefore provided for, becoming one and twenty years of age, in said Territory, and settling there between the times last aforesaid, who shall in other respects comply with the foregoing section and the provisions of this law, there shall be, and hereby is, granted the quantity of one quarter section, or one hundred and sixty acres of land, if a single man; or if married, or if he shall become married within one year from the time of arriving in said Territory, or within one year after becoming twenty-one years of age as aforesaid, then the quantity of one half section, or three hundred and twenty acres, one half to the husband and the other half to the wife in her own right, to be designated by the surveyor-general as aforesaid: *Provided always,* That no person

shall ever receive a patent for more than one donation of land in said Territory in his or her own right: *Provided*, That no mineral lands shall be located or granted under the provisions of this act.

SEC. 6. *And be it further enacted*, That within three months after the survey has been made, or where the survey has been made before the settlement commenced, then within three months from the commencement of such settlement, each of said settlers shall notify the surveyor-general, to be appointed under this act, of the precise tract or tracts claimed by them respectively under this law, and in all cases it shall be in a compact form; and where it is practicable so to do, the land so claimed shall be taken as nearly as practicable by legal sub-divisions; but where that cannot be done, it shall be the duty of the said surveyor-general to survey and mark each claim with the boundaries as claimed, at the request and expense of the claimant; the charge for the same in such case not to exceed the price paid for surveying the public lands. The surveyor-general shall enter a description of such claims in a book to be kept by him for that purpose, and note, temporarily, on the township plats, the tract or tracts so designated, with the boundaries; and whenever a conflict of boundaries shall arise prior to issuing the patent, the same shall be determined by the surveyor-general: *Provided*, That after the first December next, all claims shall be bounded by lines running east and west, and north and south: *And provided, further*, That after the survey is made, all claims shall be made in conformity to the same, and in compact form.

SEC. 7. *And be it further enacted*, That within twelve months after the surveys have been made, or, where the survey has been made before the settlement, then within twelve months from the time the settlement was

commenced, each person claiming a donation right under this act shall prove to the satisfaction of the surveyor-general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been commenced, specifying the time of the commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act; and upon such proof being made, the surveyor-general, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the commissioner of the general land office, setting forth the facts in the case, and specifying the land to which the parties are entitled. And the said surveyor-general shall return the proof so taken to the office of the commissioner of the general land office, and if the said commissioner shall find no valid objection thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof.

SEC. 8. *And be it further enacted*, That upon the death of any settler before the expiration of the four year's continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

SEC. 9. *And be it further enacted*, That no claim to a donation right under the provisions of this act, upon sections sixteen or thirty-six, shall be valid or allowed,

if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same; nor shall such claim attach to any tract or parcel of land selected for a military post, or within one mile thereof, or to any other land reserved for governmental purposes, unless the residence and cultivation thereof shall have commenced previous to the selection or reservation of the same for such purposes.

SEC. 10. *And be it further enacted*, That there be, and hereby is, granted to the Territory of Oregon the quantity of two townships of land in said Territory, west of the Cascade Mountains, and to be selected in legal subdivisions after the same has been surveyed, by the legislative assembly of said Territory, in such manner as it may deem proper, one to be located north and the other south of the Columbia River, to aid in the establishment of a university in the Territory of Oregon, in such manner as the said legislative assembly may direct, the selection to be approved by the surveyor-general.

SEC. 11. *And be it further enacted*, That what is known as the "Oregon city claim," excepting the Abernethy Island, which is hereby confirmed to the legal assigns of the Williamette Milling and Trading Companies, shall be set apart and be at the disposal of the legislative assembly, the proceeds thereof to be applied by said legislative assembly to the establishment and endowment of a university, to be located at such place in the Territory as the legislative assembly may designate: *Provided, however*, That all lots and parts of lots in said claim, sold or granted by Doctor John McLaughlin, previous to the fourth day of March, eighteen hundred and forty-nine, shall be confirmed to the parchaser or donee, or their assigns, to be certified to the commissioner of the general land offie, by the surveyor-general, and patents to issue on

said certificates, as in other cases: *Provided further*, That nothing in this act contained shall be so construed or executed, as in any way to destroy or affect any rights to land in said Territory, holden or claimed under the provisions of the treaty or treaties existing between this country and Great Britain.

SEC. 12. *And be it further enacted*, That all persons claiming land under any of the provisions of this act, by virtue of settlement and cultivation commenced subsequent to the first of December, in the year eighteen hundred and fifty, shall first make affidavit before the surveyor-general, who is hereby authorized to administer all such oaths or affirmations, or before some other competent officer, that the land claimed by them is for their own use and cultivation; that they are not acting directly or indirectly as agent for, or in the employment of others, in making such claims; and that they have made no sale or transfer, or any arrangement or agreement for any sale, transfer, or alienation of the same, or by which the said land shall enure to the benefit of any other person. And all affidavits required by this act shall be entered of record, by the surveyor-general, in a book to be kept by him for that purpose; and on proof, before a court of competent jurisdiction, that any of such oaths or affirmations are false or fraudulent, the persons making such false or fraudulent oaths or affirmations shall be subject to all the pains and penalties of perjury.

SEC. 13. *And be it further enacted*, That all questions arising under this act shall be adjudged by the surveyor-general as preliminary to a final decision according to law; and it shall be the duty of the surveyor-general, under the direction of the commissioner of the general land office, to cause proper tract books to be opened for the lands in Oregon, and to do and perform all other acts and things necessary and proper to carry out the provisions of this act.

SEC. 14. *And be it further enacted*, That no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act; and that such portions of the public lands as may be designated under the authority of the President of the United States, for forts, magazines, arsenals, dock-yards, and other needful public uses, shall be reserved and excepted from the operation of this act: *Provided*, That if it shall be deemed necessary, in the judgment of the President, to include in any such reservation the improvements of any settler made previous to the passage of this act, it shall in such case be the duty of the Secretary of War to cause the value of such improvements to be ascertained, and the amount so ascertained shall be paid to the party entitled thereto, out of any money not otherwise appropriated.

Approved, September 27, 1850.

Act of Congress, Approved February 14, 1853 (10 U. S. Stat., 158).

CHAP. LXIX.—*An Act to amend an act entitled "An Act to create the office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to the Settlers of the said Public Lands," approved September twenty-seventh, eighteen hundred and fifty.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who have located or may hereafter locate lands in the Territory of Oregon, in accordance with the provisions of an act entitled "An act to create the office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to the settlers of the said Public Lands," approved September twenty-seven, eighteen hundred and fifty, and of which survey shall have been made or may hereafter be had, in lieu of the term of continued occupation after settlement, as provided by said act, shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the Surveyor-General of said Territory at the rate of one dollar and twenty-five cents per acre for the lands so claimed, located, and surveyed as aforesaid; and upon the death of any settler before the expiration of the two years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act, up to the time of the death of such settler, shall be sufficient to entitle them to the patent.

SEC. 2. *And be it further enacted*, That upon the payment of money for lands as aforesaid to the said Surveyor-General, he shall issue his certificate of such payment, together with an accurate copy of the survey of the land so located, and purchased, to the purchaser thereof, and upon the filing of which said certificate and copy of survey in the office of the Commissioner of the General Land Office, a patent shall issue therefor as in other cases.

SEC. 3. *And be it further enacted*, That it shall be the duty of the said Surveyor-General to keep and preserve a record of all moneys so received, and to make out and transmit quarterly, to the Commissioner of the General Land Office, an accurate report of the moneys so received by him as aforesaid.

SEC. 4. *And be it further enacted*, That it shall be the duty of the said Surveyor-General, immediately upon the taking effect of this act, to enter into security in the sum of fifty thousand dollars, conditioned for the safe-keeping of all moneys received by him as Surveyor-General, according to law: *Provided, however*, That in order to compensate the Surveyor-General of said Territory for the additional labors and responsibility imposed upon him by this act, in receiving, safe-keeping, paying over, and accounting for the moneys aforesaid, he shall receive two per centum on all such sums which shall include the payment for clerk hire, together with all costs and expenses incidental to such special services in any one year: *Provided*, The salary and percentage of said Surveyor-General, and for clerk hire, shall not exceed four thousand dollars for any one year.

SEC. 5. *And be it further enacted*, That the provisions of the act to which this is an amendment be and the same are hereby extended and continued in force until

the first day of December, eighteen hundred and fifty-five.

SEC. 6. *And be it further enacted*, That every person entitled to the benefit of the fourth section of the act of which this is amendatory, who was resident in said Territory on or prior to the first of December, eighteen-hundred and fifty, shall be and hereby is required to file with the Surveyor-General of said Territory, in advance of the time when the public surveys shall be extended over the particular land claimed by him, where those surveys shall not have been made previous to the date of this act, a notice in writing, setting forth his claim to the benefits of said section, and citing all required particulars in reference to such settlement claim; and all persons failing to give such notice on or prior to the first of December, eighteen hundred and fifty-three, shall be thereafter debarred from ever receiving any benefit under said fourth section. And all persons who, on the first December, eighteen hundred and fifty-three, shall have settled on surveyed lands in said Territory, in virtue of the provisions of the fifth section of the act of which this is amendatory, who shall fail to give notice in writing of such settlement, specifying the particulars thereof to the Surveyor-General of said Territory, on or prior to the first of April, eighteen hundred and fifty-five, shall be thereafter debarred from ever receiving the benefits of said fifth section.

SEC. 7. *And be it further enacted*, That from and after the first of April, eighteen hundred and fifty-five, all public lands within the limits of the townships surveyed or to be surveyed in said Territory, west of the Cascade mountains, which shall not have been claimed under the provisions of the fourth and fifth sections of the act of which this is amendatory, or reserved for public uses by law, or order of the President, and ex-

cepting also mineral lands, shall be subject to public sale and private entry as other public lands of the United States; and so soon as he shall deem expedient, the President of the United States shall, by and with the advice and consent of the Senate, appoint a receiver of public moneys for the Territory of Oregon, west of the Cascade mountains, who shall give bond and security, in the penalty of fifty thousand dollars, for the faithful discharge of his official trust, and whose duties, under the laws in relation to the public lands of the United States in said Territory, shall be the same as those of other like officers of the United States, and who shall be allowed not exceeding five hundred dollars per annum for the safe-keeping and accounting for the public moneys by him received, including all charges for office rent and clerk hire; and at such time as the President of the United States shall deem it expedient, he shall appoint, by and with the advice and consent of the Senate, a Register of the land office for the Territory of Oregon, west of the Cascade mountains, who shall enter into bond, with sufficient security, for the faithful discharge of his official duties, as other like officers, and whose duties and authority, under the direction of the Secretary of the Interior, shall be the same as those imposed by law on other like officers, consistently with the provisions of this act and of the act of which this is amendatory, and whose compensation shall be equal to that allowed to the Receiver of Public Moneys to be appointed under this act; and until such Register shall have been appointed, and entered upon the discharge of his official duties, the Surveyor-General of Oregon shall perform all the duties which shall appertain to such office.

SEC. 8. *And be it further enacted*, That each widow now residing in Oregon Territory, and such others as shall locate in said Territory, whose husband, had he lived, would have been entitled to a claim under the

provisions of the act to which this is an amendment, shall be entitled, under the provisions and requirements of said act, to the same quantity of land that she would have been but for the death of her husband; and that in case of the death of the widow prior to the expiration of the four year's continued possession required by said act, to which this is an amendment, all the rights of the deceased shall inure unto and be vested in the heirs at law of such widow.

SEC. 9. *And be it further enacted*, That all reservations heretofore, as well as hereafter, made in pursuance of the fourteenth section of the act to which this is an amendment, shall, for magazines, arsenals, dockyards, ank other needful public uses, except for forts, be limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at any one point or place: *Provided*, That if it shall be deemed necessary, in the judgment of the President, to include in any such reservation the improvement of any settler made previous to such reservation, it shall, in such case, be the duty of the Secretary of War to cause the value of such improvements to be ascertained; and the amount so ascertained shall be paid to the party entitled thereto, out of any money in the Treasury not otherwise appropriated.

SEC. 10. *And be it further enacted*, That the said Surveyor-General, in the discharge of his duties under this act, shall be subject to all the provisions of the act entitled "An act to provide for the better organization of the Treasury, and for the collection, safekeeping, transfer, and disbursement of the public revenue," approved August sixth, eighteen hundred and forty-six; and all acts and parts of acts in conflict with the provisions of this act be and the same are hereby repealed.

Approved, February 14, 1853.

Act of Congress, Approved July 26, 1894.

(28 U. S. Stat., 122).

CHAP. 163. *An act prescribing limitations of time for completion of title to certain lands disposed of under the Act of Congress, approved September twenty-seventh, eighteen hundred and fifty, and the Acts amendatory and supplemental thereto, and commonly known as the "Donation Act," and for the protection of purchasers and occupants on said lands.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where persons under the provisions of the Act of Congress entitled "An Act to create the office of Surveyor-General of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September twenty-seventh, eighteen hundred and fifty, or the various Acts amendatory and supplemental thereto, have made proof of settlement on tracts of land in either of the States of Oregon, Washington, or Idaho, and given notice, as required by law, that they claimed such lands as donations, but have failed to execute and file in the proper land offices a proof of their continued residence on and cultivation of the lands so settled upon and claimed, so as to entitle them to patents therefor, such claimants, their heirs, devisees and grantees shall have, and they are hereby given, until the first day of January, eighteen hundred and ninety-six, the right to make and file final proofs and fully establish their rights to donations of lands under the aforesaid Act of Congress, and no longer; and all claimants who shall fail to make and file final proof and perfect their claims to lands, as donations under the Act aforesaid,

before the said first day of January, eighteen hundred and ninety-six, shall thereafter be held to have abandoned their claims to the lands embraced in their notices: *Provided*, That as soon as practicable after the passage of this Act notices shall be published at least once a week for six successive weeks in one newspaper of general circulation published in the land district, in a form to be prescribed by the Commissioner of the General Land Office, requiring such donation claimants, their heirs, devisees, and grantees, and all persons making claim to such donation claims, to appear and make final proof for such claims within the time herein provided, and that in default of such final proof such donation claims will be held to have been abandoned and the lands embraced therein shall be, and are hereby, restored to the public domain and shall be subject to disposal under the then existing laws providing for the disposition of the public lands: *Provided, further*, That where any such donation claims or any part thereof are claimed by descent, devise, judicial sale, grant, or conveyance, in good faith, under the original claimant, and are, at the date of this Act and for twenty years prior thereto have been, in the quiet adverse possession of such heir, devisee, grantee, or purchaser, or those under whom they claim, such heirs, devisees, grantees, or purchasers, upon making proof of their claims and adverse possession as aforesaid, shall be entitled to patents for the land so claimed and occupied by them: *Provided, further*, That where any portion of any such abandoned donation claim shall have been settled upon prior to January first, eighteen hundred and ninety-four, by any person under an erroneous claim of right and has been used as a *bona fide* residence by such settler where final proof shall not be made by the original claimant, or his heirs, devisees, or grantees, as aforesaid, and such settler has exhausted his or her homestead right, such settler

may, within ninety days from the first day of January, eighteen hundred and ninety-six, file with the register of the land office of the district within which the lands are situate their affidavit and the affidavits of at least two disinterested witnesses establishing the facts of their *bona fide* settlement, occupancy, and improvement of said lands, and pay to the receiver of the proper land office one dollar and twenty-five cents per acre for the land so settled upon, occupied, and improved, not exceeding one hundred and sixty acres, and shall thereupon receive patent therefor.

SEC. 2. That nothing in this Act shall be so construed as to deprive the Commissioner of the General Land Office, under the regulations governing contests in land cases, of his right, if such right now exists, to allow or direct hearings to be instituted to show that a donation claimant has abandoned the lands described in his notice, or prevent the Commissioner, when it is proven that such a claim is invalid or abandoned, from canceling the same upon the official records and thereafter disposing of the lands as a part of the public domain: *Provided*, That where hearings are allowed contestants shall pay the expenses incident thereto in the same manner that costs are paid in other contested land entries; and this Act shall not be construed to affect any case now pending before the Land Department in which final proof has been furnished.

SEC. 3. That the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, shall issue the necessary rules and regulations to give full force and effect to the provisions of this Act. Nothing in this Act contained shall be construed to impair or affect any adverse claims arising under any law of the United States other than said Donation Act, to or in respect of the lands in this Act referred to.

Approved, July 26, 1894.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE OREGON AND CALIFORNIA RAILROAD Company, appellant, *v.* THE UNITED STATES, APPELLEE. } No. 188.

APPEAL FROM THE UNITED ST TES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEE.

The distinction is attempted between this case, involving a donation claim, and Nos. 186 and 187 involving preemption and homestead claims.

This distinction does not seem to have appealed to either of the courts below, and, while ingeniously argued in the brief of counsel, seems to be not altogether clear.

The plea of the defendants below alleged that Hines, the donation claimant, abandoned the land without having paid for it or resided thereon four years, and that he was not residing thereon at the time the defendants selected the same, as aforesaid—that is, in 1871.

The assignment of errors and brief of appellant puts the construction upon the plea that the land was abandoned prior to defendant's selection, although the plea does not say when the defendant moved away from the land; and the assignment of errors contends that the proper officers of the United States should have canceled the donation notification prior to such selection, and that the approval of the defendant's selection was in fact the canceling of the donation notification.

The plea itself is not very distinct as to what is meant, but assuming that at sometime prior to 1871 John W. Hines moved away from the land, continuing to claim it and intending to reside upon it for four years, or to reside upon it for one year and pay for it, or that he had already resided upon it one year and intended to pay, but had not as yet paid for it, it would seem that in any of these suppositions this was not public land open to selection and patenting in disregard of his rights.

It is to be remembered that the bill alleges that the error or mistake in the proceeding by the Secretary was that the Secretary was in ignorance "of the adverse claim of John W. Hines" when patenting the land to the company in 1871.

It can not, therefore, be argued that he passed upon and rejected that claim in the process of approving and patenting the land to the company.

The bill also alleges that the land was "not public land subject to the grant."

As we have nothing but the allegations of the bill and plea, it is to be taken for true, we suppose, as thus implied in the bill, that Hines was making a claim when the patent was issued, in spite of his departure from the land as alleged in the plea. It does not appear that he has ceased to claim, and the fact that the Attorney-General has brought suit would seem to suffice to show that he has not, or that, somehow, the cancellation of the patent would not be useless to him or a successor to him. We shall not travel out of the record to explain what the real fact is.

The act here in question grants to the railroad company "every alternate section of *public* lands, *not mineral*, designated by odd numbers, to the number of twenty alternate sections per mile," and provides that when any of said sections "shall be found to have been granted, other lands, *designated as aforesaid*, shall be selected by said companies in lieu thereof * * * in alternate sections, designated by odd numbers as aforesaid," and not more than 10 miles beyond place limits.

It is evident that "other lands designated as aforesaid" refers to "public lands, not mineral." That is the only logical construction to be placed upon it. It could refer to but one other thing, and that is "designated by odd numbers to the number of twenty alternate sections per mile." It does not refer to that, because the act proceeds by saying "in alternate sections designated by odd numbers as aforesaid." The ordinary grammatical meaning should be placed upon the acts of Congress.

It is not likely the intention of Congress was to allow lieu selections with any more freedom than acquiring title to place lands. And when, in order to put such a construction upon its language, we must say that Congress was guilty of such a tautological expression of its intent as would be necessary to imply such an intention, we certainly do violence to what one might reasonably suppose Congress to have had in mind.

Certainly there was no intention that mineral lands could be selected as indemnity. Then none other than *public* lands could be so selected. Whether public as of date of grant, of definite location, of selection or of patent is not important here, because the same donation claim existed at each of those events.

The inquiry, then, is whether or not land subject to a valid donation notification made in 1853 was public land ten or fifteen years later.

The act of 1894 indicates what Congress then thought of it. This act was passed for the express purpose of restoring just such lands to the public domain. Such lands were not even at the passage of that act *public lands*. Had they been there would have been no necessity for its passage.

The practice of the Land Department was to treat these as other than public lands. A new entry was not allowed without a contest, and such claims were held to be excepted from grants of *public* land to railroad companies, though not mentioned in excepting clauses. (*Oregon* v. *Cal. R. R.* v. *Kuebel*, 22 L. D., 308; *Dyer* v. *Oregon & C. R. R. Co.*, 23 L. D., 569.)

Such interpretation of the law by the Interior Department will not be disturbed unless plainly erroneous.

Clearly the lieu selections were to be of "public lands." These words have come to have a very definite meaning. They have been the subject of frequent judicial inquiry in this and other courts.

In *Newhall* v. *Sanger* (92 U. S., 763) this court held that lands within the limits of an alleged Mexican or Spanish grant which was *sub judice* at time of withdrawal of lands are not embraced by a grant of public land, and said:

> The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

And in *Bardon* v. *Northern Pacific* (145 U. S., 538), Mr. Justice Field, delivering the opinion of the court, said:

> The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land to which any claims or rights of others have attached does not fall within the designation of public land.

The tract here in question was certainly neither subject to entry under the general laws at the time when defendant's rights attached nor free from all claims and rights.

The donation act does not prescribe any limit within which proof of continued residence must be made.

Section 4 provides "that there shall be, and hereby is, granted to every white settler * * * who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act * * *."

And section 7, after providing for proof of commencement of settlement (which was made in this case), continues: "And *at any time after* the expiration of four years from the date of settlement * * * shall prove in like manner * * * the fact of continued residence and cultivation required by the fourth section of this act."

"At any time after" would have been going on to this day had not the statute of limitations of 1894 come in and put a stop to it. At any time prior to 1896 proof might have been made which would entitle Hines to a patent. The record does not show whether it was made or not.

The act does not say that the four continuous years of residence must be begun at time of settlement. It does say that proof of such residence may be made at any time after four years. When we remember the liberality with which settlers upon the public domain should always be dealt with, can we say that a provision requiring the four years of residence to begin immediately upon settlement should be injected into the act? Congress evidently intended to deal leniently with the donees. That intention should be furthered rather than limited. The four years of residence were to be "consecutive years"—there was no other require-

ment. Hines, it would seem, may have left the land, relying upon the Oregon decisions about the donation act being a grant *in presenti* with condition subsequent, and, without need for any new notification, have returned and resided four years or one year, with a money payment.

But let it be admitted, for the sake of argument, that the conditions on which the donation was made had to be and had not been complied with prior to 1870; that Hines had gone away from the land and was not then residing on it—in spite of all this, the land was not free public land. There was, nevertheless, a *claim*, and until 1880, when this court decided *Hall* v. *Russell*, what the courts themselves regarded as a *valid* claim and even a *good title* in Hines. (See *Lee* v. *Summers*, 2 Or., 266; *Blaksley* v. *Caywood*, 4 Or., 279; *Chapman* v. *School District*, 1 Deady, etc.) That is to say, the donation law was held to be a grant of the fee *in presenti* to the settler on conditions subsequent. Of a breach of such conditions subsequent only the Government could take advantage by some forfeiture proceeding. And of a late or deficient compliance with them only the Government could complain. Can it be said that there was not even a claim to the land in 1870, because long after, in 1880, *Hall* v. *Russell* was decided?

Respectfully submitted.

CHARLES W. RUSSELL,
Special Assistant Attorney-General.

O

Supreme Court of the United States.

No. 188.—October Term, 1902.

The Oregon and California Railroad Company, Appellant, *vs.* The United States. | Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 4, 1903.]

This was a bill in equity filed by the United States, in the Circuit Court for the District of Oregon, to compel a reconveyance by the railroad company, as the successor and assignee of the Oregon Central Railroad Company, of certain lands within the indemnity limits of the land grant to such company of July 25, 1866, (14 Stat. 239,) for which land one John W. Hines, on November 22, 1853, seventeen years before the definite location of the line of the road, had filed a donation notification under the Oregon Donation Act of September 27, 1850, (9 Stat. 496,) and the act of February 14, 1853, (10 Stat. 158,) amendatory thereto. These lands the President of the United States on July 12, 1871, patented to the railroad company by an alleged mistake and without the knowledge of the adverse claim of Hines. By reason of this prior donation the patent was averred to be void, and its cancellation was prayed under the act of March 3, 1887, (24 Stat. 556,) authorizing the Attorney General to institute necessary proceedings to cancel patents erroneously issued to railroad companies.

The defendant in its plea averred an approval of its map of definite location January 29, 1870, a selection of the lands prior to July 12, 1871, and the further fact that Hines abandoned the land without having paid for it, or residing thereon four years, nor was he residing thereon at the time the defendant selected the same.

The Circuit Court decreed the cancellation of the patent, and the Court of Appeals affirmed the decree.

Mr. Justice Brown delivered the opinion of the Court.

This case is similar to two recent cases bearing the same title, in the first one of which (*ante*, p.) a patent of certain lands within the indemnity limits of the same road, dated February 20, 1893, was cancelled in favor of certain entrymen under the homestead laws of the United States, who had

settled upon these lands at sundry dates from 1869 to 1890, and before the defendant company had selected the lands in question as indemnity lands or had received a patent. The court found that "when the company's lists were approved neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the settlers to the lands upon which they had respectively resided;" and held that the land department had no authority, simply upon the definite location of the road, to withdraw from the operation of the pre-emption and homestead laws lands within its *indemnity* limits, and that such order did not prevent an occupancy by homestead settlers *within such limits* up to the time of the approval of the selection made by the railroad company of lieu lands, and that, as it appeared the lands were actually occupied by homestead settlers at the time they were selected by the railroad company, such lands were not open to selection, although such selection was prior to the application of the settlers for entry under the homestead laws. It appeared in the case that the settlers had moved with due diligence to perfect and protect the right acquired by their occupancy of the lands, but were unable to obtain formal entry of the same, because the lands had not been surveyed. "At the time the settler went upon the land in good faith to make it his home and to perfect his title under the homestead laws there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws."

The second case was like unto the first, except that there had been a long delay by the land department in having the land surveyed. It was held that the land department had acted "with all convenient speed" within the meaning of the act of 1870, (16 Stat. 94, sec 2,) making the land grant. (*Ante*, p. .)

In both of these cases, however, the lands were in actual occupation of settlers under the homestead laws at the time selection was made by the railroad company and the patents issued.

In this case the settlement was made under the Oregon Donation Act, (9 Stat. 496,) the fourth section of which enacts that "there shall be, and hereby is, granted to every white settler or occupant of the public lands, . . . who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or 320 acres of land," &c.; and by the first section of the amendatory act of 1853, (10 Stat. 158,) it was provided that settlers under the former act, in lieu of the term of continued occupation after settlement, as provided by said act, shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the surveyor general of said Territory at the rate of $1.25 per acre of the land

so claimed. The plea alleges that Hines abandoned the land without having paid for it under the act of 1853, or residing on it for four years under the original act; and the case turns upon the question whether, by the mere filing of the donation notification in 1853, and the subsequent abandonment of the lands, they fall within the category of those which had been "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of," within the meaning of the act of July 25, 1866, granting lands for the construction of this road. Clearly the lands do not fall literally within either of the above designations, and unless a claim existing of record to the lands—which claim had in fact been abandoned for fifteen years—operates to prevent the selection of such lands by the railroad company, such company takes a good title to them.

That a railway grant does not attach to lands which at the time of the definite location of the land have been sold, pre-empted, reserved or otherwise disposed of by the United States for any purpose, has been so often decided by this court as to be no longer open to question. (*Leavenworth &c. R. R. Co.* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *Doolan* v. *Carr*, 125 U. S. 618; *United States* v. *McLaughlin*, 127 U. S. 428; *Cameron* v. *United States*, 148 U. S. 301; *Carr* v. *Quigley*, 149 U. S. 652.) These cases, however, merely apply the language of the statutes to variant circumstances. Neither of them turns upon the effect of a claim which has been cancelled or abandoned before or after the attachment of the railroad grant, either by the definite location of the line or by the selection of the lands as lieu lands within the indemnity limits.

That question was first considered in *Kansas Pacific R. R. Co.* v. *Dunmeyer*, (113 U. S. 639,) which involved the title to part of an odd-numbered section within the place limits of the Union Pacific Railroad Company's grants of 1862, 1864 and 1866. The facts were that one Miller made a homestead entry upon this section July 20, 1856, which was valid if the land was then public land. The line of definite location was filed September 21, 1866, so that the entry of Miller brought the land within the exception in the grant as land to which the homestead claim attached at the time the line of the road was definitely fixed. It was argued by the company that, although the homestead entry had attached to the land, and Miller had entered upon it within the time prescribed by law, erected a house upon it, and brought his family to live upon it, and made the tract his home until the spring of 1870, yet that he afterwards abandoned his homestead claim, bought the land from the railroad company, and paid for it, and sold the land to Dunmeyer, who had obtained a conveyance from the company. From this it was argued that the exception no longer operated and the land had reverted to the company. But it was held

that, as Miller's claim was an existing one of public record when the railroad map was filed, it was excepted from the land grant, notwithstanding the subsequent abandonment. The case is readily distinguishable from the one under consideration in the fact that Miller had not only entered upon the land, but was in actual possession of it at the time of the definite location of the road, and that he did not abandon his entry until nearly four years after the line of definite location was filed.

A case not dissimilar is that of *Bardon* v. *Northern Pacific Railroad*, (145 U. S. 535.) That case arose from a land grant to the Northern Pacific Company of July 2, 1864, (13 Stat. 365,) under which act the company proceeded to designate the general route of its road, and afterwards to have its line definitely fixed. The date when the line was definitely fixed is not stated in the report, and is not treated as material, but it appears that on September 12, 1855, one Robinson settled upon the land, filed his declaration under the pre-emption laws, but died without filing proof or paying the government for the land. On August 5, 1865, this pre-emption claim was cancelled for alleged failure to furnish proof of continuous residence prior to July 30, 1857. It was held that, as it appeared the premises had been taken up on the pre-emption claim of Robinson before the railroad grant took effect, and that the cancellation had not then been made, nor for more than a year afterwards, such cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation which applied to land *then* public.

In the consideration of the present case we are not embarrassed by either of these adjudications, since in one case the lands were not only actually occupied by the homestead claimant at the time the railroad grant took effect, but in both cases the proof of such occupation was of record in the proper office, and the lands were abandoned in one case, and the certificate cancelled in the other after that date, while in this case the land was abandoned fifteen years before the lands were selected by the company, and nothing remained to indicate that the land was reserved, except the donation notification in the office of the surveyor general.

Two other cases are more directly in point. In *Hastings &c R. R. Co.* v. *Whitney*, (132 U. S. 357,) the grant was made to the railroad July 4, 1866, and the line definitely located March 7, 1867. In May, 1865, one Turner applied, through his attorney, to enter the land in question as a homestead. The affidavit did not state that Turner's family, or any member thereof, was residing on the land, or that there was any improvement thereon, and, as a matter of fact, no member of his family was residing, or ever did reside, on said land, and no improvement was made thereon by any one. The entry was allowed and stood upon the records of the land office un-

cancelled until September 30, 1872, when the entry was cancelled. The land was subsequently, in 1877, entered by Whitney as a homestead and a patent delivered. It was held that the homestead entry of Turner excepted it from the operation of the land grant, notwithstanding the entry was invalid on its face. "So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grants."

In *Whitney* v. *Taylor*, (158 U. S. 85,) one Jones, in May, 1854, settled upon a quarter section of public land in California, and as soon as the land was surveyed (in 1857) declared his intention to claim it as a pre-emption right, paid the fees required by law, and caused notice of the same to be filed in the proper government record. He occupied the tract until 1859, when he left for England and never returned. The land was found to be within the place limits of the grant to the Central Pacific Railroad Company of 1862. This company filed its map of definite location in 1864, and demanded the section in question. In 1885 the pre-emption entry of Jones was cancelled. It was held that the tract, being subject to the claim of Jones at the time when the grant to the railroad company took effect, it was excepted from the operation of that grant, and that after the cancellation of that entry became part of the public domain, and that such cancellation did not enure to the benefit of the railroad company.

The latest case upon the subject, however, is that of the *Northern Pacific Railway* v. *De Lacey*, (174 U. S. 622.) In that case the railroad company had filed its map of definite location March 26, 1884. On April 9, 1869, one John Flett filed a declaratory statement of his intention to purchase the land under the pre-emption laws. In the fall of the same year, Flett left the land and did not thereafter reside on the same, although it appears that, in September, 1870, he went to the local land office and told the officers that he had come to prove his claim. He was told that he had lost it, as it had become railroad land. He acquiesced in this statement. In 1887, eighteen years after his original entry, Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement. A hearing was had in the presence of all the parties, which finally resulted in a decision of the Secretary of the Interior, September 28, 1891, awarding the land in controversy to the railroad company. Flett's declaratory statement was not formally cancelled upon the records until December 23, 1891. A suit brought in the Circuit Court by the railroad company resulted in its favor, but the decree was reversed by the Court of Appeals, and the case brought here for review.

It was contended that at the time, March 26, 1884, when the map of definite location was filed, the declaratory statement of Flett, filed in the

local land office in 1869, remained there as a record, and was an assertion of a pre-emption claim, and that under the case of *Whitney* v. *Taylor*, above cited, the land described in that statement was excepted from the grant to the railroad company. The question was presented whether the proceedings in the case of Flett were of such a character as to prevent the grant to the company from taking effect at the time of filing its map of definite location, March 26, 1884. It was held that, under the seventh section of the act of July 14, 1870, (16 Stat. 279,) claimants of pre-emption rights must make proper proof and payment of the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired; that under the act of March 3, 1871, (16 Stat. 601,) twelve months in addition to that provided in the first act were given to the claimants to make proof and payment; that, adding the eighteen months given by the first act to the twelve months given by the second act, all claimants of pre-emption rights were given thirty months to make the proper proof and payment for the lands claimed, and that "whether such proof and payment were made would be matter of record, and if they were not so made the original claim was cancelled by operation of law, and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and cancelled the entry just as effectually as if the fact were evidenced by an entry upon the record." The case of *Whitney* v. *Taylor* was distinguished upon the ground that, in that case, "there was no period within which a pre-emptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered for sale by the proclamation of the President." It was held that, as the thirty months allowed to Flett had expired years before the filing of the map of definite location, there was no existing claim at that time, and that the grant of the railroad company took effect, "Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed."

Recurring now to the case under consideration, it appears that by the sixth section of the Oregon Donation Act, (9 Stat. 498,) it was incumbent upon the settler to notify the surveyor general, within three months from the commencement of his settlement, of the precise tract claimed by him; and by section seven, within twelve months from the time the settlement commenced, must prove to the satisfaction of the surveyor general that the settlement and cultivation required by the act had been commenced, and that at any time after the expiration of four years from such settlement might prove the fact of continual residence and cultivation required by the fourth section, when upon such proof being made, the surveyor general

issues the proper certificate, forwards the same to the Commissioner of the General Land Office, whose duty it is to issue patents for the land.

It is true that by the act of July 26, 1894, (28 Stat. 129,) where proof of settlement had been made under the donation acts and notice given as required by law, but there had been a failure to execute and file in the land office proof of continued residence and cultivation of the land so settled upon, so as to entitle the donees to patents, such claimants, their heirs, devisees, assigns and grantees, were given the right until January 21, 1896, "to make and file final proofs and fully establish their rights to donations" under the aforesaid act of Congress, and upon failure to do so they were to be held to have abandoned their claims. But by section two of the same act the Commissioner of the Land Office was given the right, if such right existed, "to allow or direct hearings to be instituted to show that a donation claimant has abandoned the lands described in his notice, or prevent the Commissioner, when it is proven that such claim is invalid or abandoned, from cancelling the same upon the official records, and thereafter disposing of the land as a part of the public domain;" and by section three, "nothing in this act shall be construed to impair or affect any adverse claims arising under any law of the United States other than said donation act, to or in respect of the lands in this act referred to."

It is entirely clear that the position of the government in this case is not strengthened by anything contained in this act, since it was intended only for the relief of those who had resided continuously upon and cultivated the lands specified in the original donation notification, but had through mistake or negligence omitted to make and file their final proofs and fully establish their rights to such donations. Such donees were given until January 1, 1896, to make such final proof and obtain their patents; but they were not given thereby the right to perfect their claims to lands which they had abandoned before completing a continued residence of four years thereon. This inference is rendered only the more clear by the second section, which authorizes the Commissioner, when it is proved that such claim is invalid or abandoned, to cancel the same upon the official records, and by the third section, which expressly saves adverse claims arising under any law other than the donation act.

It is clear that title to the land here in question never passed from the United States under the donation acts of 1850 and 1853, since the donation was only made to those "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act." (*Hall* v. *Russell*, 101 U. S. 503; *Maynard* v. *Hill*, 125 U. S. 190.) As these conditions were never complied with, the land continued to be the property of the United States, to which the railroad grant subsequently attached, unless such grant was defeated by the fact that the

donation notification still remained of record in the office of the surveyor general. As the land had neither been "granted, sold . . . occupied by homestead settlers, pre-empted or otherwise disposed of," the bill can only be sustained upon the ground that at the time land was selected it was "reserved" from sale. But for what purpose was it reserved? Not for the donation settler, since he had abandoned the land fifteen years before; not for the United States, since every possible encumbrance had been removed from them, and they had lapsed into their original conditions of public lands, open to pre-emption or sale. It is true the donation notification had not been formally cancelled, but the donation acts made no provision for such cancellation, although it may, perhaps, have been within the power of the land department to take such action even prior to the act of 1894. This, however, was not done, and the land might have remained in that condition permanently, had not some other person applied to enter or purchase it by showing that it had been abandoned by the original donee. But, if this may be done by an individual pre-emptor, why may not a railroad company do the same thing by claiming the land under its grant, and showing in defense to this suit that it had actually been abandoned? It may be said that presumptively the land had been reserved, as shown by the donation notification, and for aught that appeared the donee might still be in possession, but we know of no reason why the railroad company may not show the actual facts as well as an individual who might desire to enter the land upon his own account. Even admitting that the donation notification was on file in the office of the surveyor general, there was no proof, required by section seven of the act to be filed within twelve months from the time of settlement, that the settlement and cultivation required by the act had been commenced; nor after the expiration of four years from such settlement was there any proof of continual residence or cultivation, required by the same section. The record which informed the company that the land had been settled by a donee also apprized it that the provision of the statute had not been complied with. We think that, considering the fact that fourteen years had elapsed since the original settlement, the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. Under the facts of this case we think the lands were not reserved within the meaning of the granting act.

But even if the position of the government be correct and the patent be subject to cancellation, we see nothing to prevent the railroad company from again selecting the same land to make good its losses within the limits of its primary grant, no intermediate rights being shown to have accrued. If such be the fact, it would be useless to direct the cancellation of the patent, as it would become the duty of the land department to issue

immediately a new one for the same property. (*Germania Iron Company* v. *United States*, 165 U. S. 379; *United States* v. *Central Pacific Railroad Company*, 26 Fed. Rep. 479.)

The decrees of the courts below are therefore reversed and the case remanded to the Circuit Court for the District of Oregon with directions to dismiss the bill,

Mr. Justice McKenna, having filed the bill in this case as Attorney General, did not participate in this decision.

True copy.

Test:

Clerk Supreme Court, U. S